Filed 4/10/19 Hartley v. Yucca Valley Auto Superstores, Inc. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

KATHY HARTLEY, Plaintiff and Respondent, v. YUCCA VALLEY AUTO SUPERSTORES, INC., Defendant and Appellant.	E068258 (Super.Ct.No. CIVDS1610298) OPINION

APPEAL from the Superior Court of San Bernardino County. Thomas Garza, Judge. Affirmed.

Pope, Berger, Williams & Reynolds LLP and Harvey C. Berger; Williams Iagmin LLP and Jon R. Williams for Defendant and Appellant.

Dickson Geesman LLP, Emily A. Nugent and Kathryn B. Dickson; Beaman Law and Megan J. Beaman for Plaintiff and Respondent.

Plaintiff was terminated from her employment after making a claim for gender discrimination when a less experienced male employee at Yucca Valley Chrysler Center,

a dealership owned by Carol Bell, who also owned Yucca Valley Auto Superstores, Inc., was promoted to the position of Assistant General Manager, for which position plaintiff was better qualified. Plaintiff filed a lawsuit under the California Fair Employment and Housing Act (Govt. Code, § 12940, et seq.), and defendants filed a petition to compel arbitration. The trial court denied the petition because the defendants failed to produce a valid arbitration agreement for the relevant period of plaintiff's employment at Yucca Valley Chrysler Center. Defendants appealed.

On appeal, defendants argue there is insufficient evidence to support the trial court's finding that when plaintiff left one of defendant's dealerships to work for another in 2001, her employment at the former was terminated, nullifying that arbitration agreement. Defendants also challenge the court's determination that the terms of the purported arbitration agreement produced by defendants were unconscionable. We affirm.

BACKGROUND

Carol Bell, owner of Yucca Valley Auto Superstores, Inc. (YVAS), as well as Yucca Valley Chrysler Center (YVCC) and Yucca Valley Ford Center (YVFC), referred to collectively as defendants, hired plaintiff in 1994 to work at YVCC. At that time, plaintiff signed an arbitration agreement. Soon after plaintiff commenced employment, defendant hired Kelly Gaab, a male part-time sales person.

In 1996, plaintiff terminated her employment at YVCC to work at Marshall Motor Cars, Inc. Later that same year, plaintiff left Marshall and returned to work at YVCC. In

1997, defendants promoted Gaab to position of General Manager, without giving plaintiff an opportunity to apply for the position, or even informing her of the opening, despite the fact she had longer tenure than Gaab. In approximately 1999 or 2000, Gaab became a part owner of YVCC.

Gaab soon engaged in a continual course of conduct involving disparagement of women in general, and women employed at YVCC and YVFC. He engaged in aggressive negative behavior with female employees, changing the conditions of employment for female employees based solely on their gender, and eventually causing the termination of the female employees, or making conditions so intolerable that female employees resigned.

In 2002, plaintiff left YVCC, where she was a sales person, to take a position at YVFC as sales manager. Because the dealerships were separate entities, plaintiff could not work in both stores at the same time, so she resigned from one to take the position with the other. Plaintiff's W-2 forms for her respective employments at YVCC and YVFC reflect different employer identification numbers.[1]

In June 2003, plaintiff wanted to return to YVCC, and Bell rehired her there. When she was rehired by YVCC, she did not sign any arbitration agreement. Plaintiff was promoted to sales manager, the position she held until her termination in 2016.

---

[1] Defendants claim that the various dealerships are not separate entities and that plaintiff merely transferred from one dealership to the other. Thus, defendants argue that the 2001 arbitration agreements relating to YVFC bound plaintiff to arbitration despite the fact she left that dealership to work again at YVCC, where there was no arbitration agreement.

Beginning in either 2007 or 2008, Gaab focused his negative behavior on plaintiff, making disparaging remarks about her, excluding her from routine and critical staff and management meetings, unfairly criticizing and scrutinizing her work and attendance, and otherwise unfavorably altering the terms and conditions of her employment. Beginning in 2011, plaintiff complained about Gaab's discriminatory treatment to Bell, as well as to the officer manager, sales manager, and assistant general manager, among others.

The personnel at the dealership until 2015 comprised a general manager, two sales managers, several sales staff and other staff. In 2015, defendants created a new assistant general manager position, immediately superior to the sales managers, and immediately subordinate to the general manager. Plaintiff was not informed of the new position or given an opportunity to apply for it. Instead, Gaab announced on July 17, 2015, that a new hire, a man who had no prior experience at the Yucca Valley Ford or Chrysler dealerships, and who had less experience in auto sales and management than plaintiff, would be the new assistant general manager, where he would be plaintiff's immediate supervisor.

Because plaintiff's family[2] depended on her income and because there was no comparable employment available to plaintiff in Yucca Valley, she was required to continue working for defendants. Plaintiff experienced extreme anguish and humiliation and sought medical treatment for the depression and anxiety that limited her major life

[2] Plaintiff's husband, Ivan Hartley, was also employed at the dealerships, and was terminated when plaintiff was fired. However, because defendants were able to produce a valid arbitration agreement binding Ivan to arbitrate, he agreed to submit to arbitration of his claims. He is not a part of this appeal.

activities. On August 21, 2015, plaintiff's doctor directed her to take a medical leave from work, and she presented the doctor's directive to defendants in person. Shortly after beginning her medical leave, plaintiff sent an email to Bell, expressing her disappointment at being passed over for the new position on the basis of her gender.

On December 8, 2015, plaintiff filed a complaint with the California Department of Fair Employment and Housing based on the defendants' discrimination against plaintiff based on her gender. Shortly thereafter, defendant's treated plaintiff's husband Ivan, also an employee of defendants, in a retaliatory manner, reducing the sales given to him and thereby reducing his commission income. On February 11, 2016, Ivan complained to defendants about the retaliation he was experiencing as a result of plaintiff's complaint and requested that it be addressed, but it was not.

Six weeks later, on March 25, 2016, defendants summarily terminated both plaintiff and her husband. On June 27, 2016, plaintiff and her husband filed a complaint for damages for sex discrimination, associational sex discrimination, harassment, disability discrimination, failure to prevent discrimination, failure to accommodate, failure to engage in the good faith interactive process, retaliation, and wrongful termination.

On January 4, 2017, defendants filed a petition to compel arbitration. Ivan Hartley agreed to submit to arbitration, so the civil action as to him was stayed by stipulation. As for plaintiff, defendants produced a document purporting to be an arbitration agreement signed by plaintiff on October 24, 2001, while plaintiff was employed at YVCC, but the

signature was not plaintiff's and plaintiff did not recall signing the document. Defendants also produced page three of a document dated November 14, 2001, bearing plaintiff's signature, but omitting other pages of the document reflecting its terms. Plaintiff did not recall receiving any other pages.

On February 9, 2017, the trial court considered the petition, and on March 10, 2017, it denied defendants' petition to compel arbitration as to plaintiff Kathy Hartley.[3] Defendants timely appealed.

DISCUSSION

1. The Trial Court Correctly Found There Was No Valid Agreement to Arbitrate Between Defendants and Plaintiff.

Defendants argue that the court erred in finding that there was no valid arbitration agreement. Specifically, they point to the fact that the Chrysler and Ford dealerships have a common owner to support the assertion that plaintiff merely transferred between divisions when she left the Chrysler dealership to go work at the Ford dealership, followed by her return to work at the Chrysler dealership. In this regard, defendants argue that the third arbitration agreement, signed in November 2001 when plaintiff worked for YVFC, obligated plaintiff to submit to arbitration of her claims arising after she recommenced working at YVCC. We disagree.

---

[3] There are two orders denying the defendants' petition, one prepared by plaintiff's counsel, and one prepared by defendants, both of which reflect the denial of the petition. Defendants' counsel acknowledged receipt of plaintiff's proposed order before preparing the alternate version and does not explain why a separate order was needed. We therefore consider it as surplusage.

"Public policy favors contractual arbitration as a means of resolving disputes." (*Espejo v. Southern California Permanente Medical Group* (2016) 246 Cal.App.4th 1047, 1057.) However, that policy does not extend to those who are not parties to an arbitration agreement, and a party cannot be compelled to arbitrate a dispute that he has not agreed to resolve by arbitration. (*Ibid.*; see also, *Avery v. Integrated Healthcare Holdings, Inc.* (2013) 218 Cal.App.4th 50, 59 [Although the law favors contracts for arbitration of disputes between parties, there is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate]; see also, *Rice v. Downs* (2016) 248 Cal.App.4th 175, 185.)

Pursuant to this policy, under Code of Civil Procedure section 1281.2, a court shall order arbitration "[o]n petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party to the agreement refuses to arbitrate that controversy, . . . if it determines that an agreement to arbitrate the controversy exists."

"'[T]he threshold question presented by a petition to compel arbitration is whether there is an agreement to arbitrate.'" (*Cruise v. Kroger* (2015) 233 Cal.App.4th 390, 396, citing *Cheng–Canindin v. Renaissance Hotel Associates* (1996) 50 Cal.App.4th 676, 683.) "The party seeking to compel arbitration bears the burden of proving by a

preponderance of the evidence the existence of an arbitration agreement." (*Tiri v. Lucky Chances, Inc*. (2014) 226 Cal.App.4th 231, 239.)[4]

Notwithstanding the strong public policy favoring arbitration of disputes where there is an agreement, "'"there is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate."' [Citations.]" (*San Francisco Police Officers' Assn. v. San Francisco Police Com.* (2018) 27 Cal.App.5th 676, 683, quoting *Victoria v. Superior Court* (1985) 40 Cal.3d 734, 744.)

"Because the existence of the agreement is a statutory prerequisite to granting the petition, the petitioner bears the burden of proving its existence by a preponderance of the evidence." (*Rosenthal v. Great Western Fin. Securities Corp*. (1996) 14 Cal.4th 394, 413.) On appeal, if the court's order is based on a decision of fact, we apply a substantial evidence standard of review. (*Carlson v. Home Team Pest Defense, Inc*. (2015) 239 Cal.App.4th 619, 630; see also, *City of Vista v. Sutro & Co*. (1997) 52 Cal.App.4th 401, 407, citing *Engineers & Architects Assn. v. Community Development Dept.* (1994) 30 Cal.App.4th 644, 653.)

A defendant may meet its "initial burden to show an agreement to arbitrate by attaching a copy of the arbitration agreement purportedly bearing the opposing party's signature." (*Espejo v. Southern California Permanente Medical Group, supra,* 246 Cal.App.4th at p. 1060, italics omitted.) Generally, an arbitration agreement must be

---

[4] We are aware that there are situations in which a valid arbitration agreement may be implied in fact (see *Pinnacle Museum Tower Assn. v. Pinnacle Mkt. Dev.* (*US*), *LLC* (2012) 55 Cal.4th 223, 236), but defendants did not present that theory in the trial court, and do not raise it on appeal.

memorialized in writing. (*Fagelbaum & Heller LLP v. Smylie* (2009) 174 Cal.App.4th 1351, 1363.) A party's acceptance of an agreement to arbitrate may be express, as where a party signs the agreement, but a signed agreement is not necessary; a party's acceptance may be implied in fact (see *Craig v. Brown & Root, Inc*. (2000) 84 Cal.App.4th 416, 420 [employee's continued employment constitutes acceptance of an arbitration agreement included in an employee brochure and memorandum provided by the employer]) or be effectuated by delegated consent (e.g., *Ruiz v. Podolsky* (2010) 50 Cal.4th 838, 852–854). An arbitration clause within a contract may be binding on a party even if the party never actually read the clause. (*24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1215.)

However, absent evidence that the employee actually received notification of such a policy, a party's failure to recall signing an arbitration agreement is sufficient to challenge the validity of the signature. (*Ruiz v. Moss Bros. Auto Group, Inc*. (2014) 232 Cal.App.4th 836, 846 [court held that "[i]n the face of Ruiz's failure to recall signing the 2011 agreement, Moss Bros. had the burden of proving by a preponderance of the evidence that the electronic signature was authentic."].) For this reason, where the party opposing arbitration challenges the validity of that signature in opposition, the defendant is then required to establish "by a preponderance of the evidence that the signature was authentic." (*Ibid.*)

Regarding the terms of the arbitration agreement to be established by the party moving to compel arbitration, we agree that ordinarily one who signs an instrument,

which on its face is a contract, is deemed to assent to all its terms. (*Marin Storage & Trucking, Inc. v. Benco Contracting & Eng'g, Inc*. (2001) 89 Cal.App.4th 1042, 1049.) However, when the writing does not appear to be a contract and the terms are not called to the attention of the recipient, no contract is formed with respect to the undisclosed term or terms. (*Id*., at pp. 1049-1050; see also, *Windsor Mills, Inc. v. Collins & Aikman Corp*. (1972) 25 Cal.App.3d 987, 993–994 [arbitration clause contained in Acknowledgement of Order].)

Here, defendants failed to establish by a preponderance that the signature on the October 2001 arbitration agreement was plaintiff's, or that a valid agreement covered the period when the claims arose, because there was a break in plaintiff's employment at defendants' family of dealerships and there was no arbitration agreement produced for 2003. The trial court found that the 1994 agreement was terminated when plaintiff left her employment to work at another dealership. The purported second arbitration agreement, allegedly signed in October 2001, was of dubious origin where plaintiff questioned whether the signature on the agreement was hers and provided her drivers' license to demonstrate the difference.

Additionally, Carol Bell's own declaration indicates that "In an around November 2001, Yucca Valley provided all of its employees with the same two-page 'Employee Acknowledgment and Agreement,'" but the exhibit proffered by defendant as a valid arbitration agreement was executed the month before that policy was adopted. The trial

court concluded defendants had failed to establish she executed the October 24, 2001, document, and there is substantial evidence to support this finding.

Another document, executed on November 14, 2001, bears plaintiff's signature, but consisted only of the second page, causing the court to rule that it was incomplete and invalid. Because the first page evidencing the employee's acknowledgment of receipt of the employee's handbook was missing, no agreement to arbitrate may be implied in fact. (See *Marin Storage & Trucking, Inc. v. Benco Contracting & Eng'g, Inc*., *supra,* 89 Cal.App.4th at pp. 1049-1050; see also, *Windsor Mills, Inc. v. Collins & Aikman Corp*., *supra,* 25 Cal.App.3d at pp. 993–994.) Even if it did constitute a valid arbitration agreement, it was terminated when plaintiff left YVCC in 2002, to work at YVFC, where no arbitration agreement was ever executed. When plaintiff returned to work at YVCC, the dealership at which the claims arose, she did not sign an arbitration agreement, and defendants presented no argument or evidence to the contrary.

Instead, defendants argue that plaintiff merely transferred between YVCC and YVFC, and then back to YVCC, such that plaintiff's signature on the incomplete agreement dated November 2001 bound her to arbitrate her claims. In support of this claim, defendants point to the fact that plaintiff referred to the dealerships collectively as "defendants," as undermining the court's finding they were separate entities. Not so. The nomenclature used in a complaint to refer to multiple defendants collectively does not make them a unitary entity, and defendants cite no authority to support an assertion to the contrary.

Instead, plaintiff presented evidence that the entities were separate. She received separate W-2 forms covering her respective employments at YVFC and YVCC, the respective dealerships. The W-2 form for 2002 names YVFC as her employer, while her W-2 form for 2003 names YVCC. Each W-2 form bears a different employer number. YVFC was incorporated separately and is listed as wholly owned by Carol Bell, while YVCC is partly owned by Gaab, who is also an officer of YVAS. Plaintiff's evidence demonstrated the separate nature of the entities as well as plaintiff's employment. The burden then shifted to defendants to demonstrate they were part of a singular business entity. (*Craig v. Brown & Root, supra,* 84 Cal.App.4th at p. 421.)

Defendants did not meet that burden. Moreover, in the trial court, defendants claimed YVFC had been erroneously sued. If, as counsel for plaintiff argued in the trial court, the entities were truly interchangeable, there would be no argument that YVFC was improperly named in the complaint. There is substantial evidence supporting the court's finding that they were different employers, and that plaintiff did not simply transfer between divisions.

The only actual arbitration agreement known to have been signed by plaintiff was executed in 1994, but it was terminated when plaintiff left to work at a different dealership, not owned by Bell or Gaab. Defendants have posited no argument that the 1994 agreement survived plaintiff's termination of employment, when she left to go to work for Marshall Motor Cars, Inc. Because the October 2001 document included an express term that it superseded all prior agreements, defendants are estopped to rely on

the 1994 agreement. Because the October 2001 agreement was not shown to have been executed by plaintiff, it does not support defendant's petition to compel arbitration.

The next document, which does bear plaintiff's signature, was signed a month later in 2001, but that document was incomplete, omitting the first page of the agreement outlining the agreement to submit any claims to binding arbitration under the Federal Arbitration Act, the name of an arbitrator, as well as the issue of fees, and did not reflect that the terms of the agreement had purportedly been negotiated. Additionally, the agreement does not include a survivability clause or reflect the parties intent that it bind them in perpetuity.

There is substantial evidence to support the trial court's finding that this document did not bind plaintiff to arbitration. Even assuming there was a valid 2001 arbitration agreement with YVCC, it terminated when plaintiff left YVCC to work at YVFC, absent evidence to the contrary.[5] Without a full agreement, we cannot speculate that its terms were automatically resurrected and reactivated upon plaintiff's re-hiring at YVCC, so it did not cover the period following 2003, when plaintiff was later rehired at YVCC.

Defendants failed to establish the existence of a valid arbitration agreement binding plaintiff to arbitrate her claims.

---

[5] The "Employee Acknowledgment and Agreement" executed by plaintiff's husband respecting YVCC, includes the first page, providing that binding arbitration would apply to "any claim, dispute, and/or controversy [. . .] that either I or the Dealership (or its owners, directors, officers, managers, employees, agents and parties affiliated with its employee benefit and health plans) may have against the other . . . ." Ivan's agreement acknowledges his receipt of the "YUCCA VALLEY CHRYSLER CENTER Employee Handbook," so there is little room to argue that the agreement extended beyond YVCC to YVFC, for the term of employment there.

2. The Trial Court's Unconscionability Finding is Supported By Substantial Evidence.

In the trial court, plaintiff argued that in the event the court found that the November 2001 arbitration agreement survived plaintiff's change of employment from YVCC to YVFC and then back to YVCC, the agreement could not be enforced because it lacked definite and certain terms and was unconscionable.

At the hearing, after discussing why there was no valid arbitration agreement, the court addressed the merits of plaintiff's argument on unconscionability. Specifically, the court agreed there was no evidence that plaintiff had any part in negotiating the terms, there was no survival clause, and the agreement did not indicate a specific arbitrator or the issue of fees. Defendants argue that the trial court erred in concluding that the November 2001 arbitration agreement was unenforceable for unconscionability. We disagree.

Because we have determined that the trial court correctly ruled there was no arbitration agreement covering plaintiff's employment upon her return to YVCC in 2003, ordinarily we would not reach this issue. However, to prevent similar issues from arising in the future, we address it.

It is well settled that a court may refuse to enforce an arbitration agreement if it is unconscionable. (Civ. Code, §1670.5, subd. (a); *Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702, 711.) A common definition of unconscionability is that it refers to an absence of meaningful choice on the part of one of the parties together with contract

terms which are unreasonably favorable to the other party. (*Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1133 (*Sonic II*).)[6]

This formulation has both a procedural and substantive element: the procedural element focuses on oppression or surprise due to unequal bargaining power, taking the form of a contract of adhesion, while the substantive element focuses on overly harsh or one-sided results, such as lack of bilaterality, such as where an employee's claims against the employer, but not the employer's claims against the employee, are subject to arbitration. (*Sonic II, supra,* 57 Cal.4th at pp. 1133-1134; see also, *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 119 [abrogated in part by *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 340, 352].)

Both procedural and substantive unconscionability must be present for the court to refuse to enforce a contract on the ground of unconscionability, although not in the same degree. (*Ramos v. Superior Court* (2018) 28 Cal.App.5th 1042, 1063, citing *Farrar v. Direct Commerce, Inc.* (2017) 9 Cal.App.5th 1257, 1265.) The burden of proving unconscionability is on the party resisting arbitration. (*Malone v. Superior Court* (2014) 226 Cal.App.4th 1551, 1561.) "'Unconscionability is ultimately a question of law, which we review de novo when no meaningful factual disputes exist as to the evidence.' [Citation.]" (*Id.*, at p. 1562.)

---

6 In 2011, the California Supreme Court issued an opinion in *Sonic-Calabasas A, Inc. v. Moreno* (2011) 51 Cal.4th 659 (*Sonic I*), in which it reversed a decision by the Second District Court of Appeal, which, in turn, had reversed a trial court order denying as premature plaintiff employer's petition to compel arbitration of a wage claim.

In order to insure that mandatory arbitration agreements are not used to curtail an employee's public rights, the California Supreme Court in *Armendariz, supra,* set out five minimum requirements. (*Armendariz, supra,* 24 Cal.4th at pp. 102, 110-111.) Arbitration agreements in the employer-employee context must provide for (1) neutral arbitrators, (2) more than minimal discovery, (3) a written award, (4) all types of relief that would otherwise be available in court, and (5) no additional costs for the employee beyond what the employee would incur if he or she were bringing the claim in court. (*Ibid.*) *Armendariz* concluded that contracts of adhesion are unconscionable, concluding that arbitration agreements should contain "a modicum of bilaterality." (*Armendariz, supra,* 24 Cal.4th at p.117.)

Here, only the November 2001 document bears a signature recognized by plaintiff as hers, but that document omits the first page, and plaintiff had no recollection of reviewing or receiving the first page of the document. There was no evidence presented that plaintiff participated in negotiating the terms of any of the purported arbitration agreements, and the declaration of Donna Frydenlund, stating that it was "Yucca Valley's policy that all employees are provided with the same arbitration agreements," which are placed into each employee's personal file, suggests that there was no negotiation of terms.

Further, defendant's personnel files did not include the entire document. This prevented the trial court, as it prevents us, from determining whether the terms of the agreement are bilateral, or if the agreement required plaintiff to waive any statutory

protections as a condition of employment. In this regard, we cannot simply assume that the terms of the agreement are the same as that signed by plaintiff's husband because defendants did not follow their policy of placing the full agreement into each employee's file.

Based on the lack of evidence that plaintiff received the entire document, or that she was able to negotiate the terms of the agreement, as well as the fact that the partial document fails to identify any rules or procedures under which arbitration would proceed, or who would pay for the costs or fees associated with arbitration, the trial court properly found the partial document was unconscionable, to the extent it purported to be an arbitration agreement executed by plaintiff.

DISPOSITION

The judgment is affirmed. Plaintiff is entitled to costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

McKINSTER
J.

CODRINGTON
J.